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FIREMAN'S FUND INSURANCE COMPANY,  
a foreign corporation a/s/o BASIC RESOURCES, INC.  
and GEORGE REED, INC., a foreign corporation

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

FIREMAN'S FUND INSURANCE  
COMPANY, a foreign corporation  
a/s/o BASIC RESOURCES, INC.  
and GEORGE REED, INC., a foreign  
corporation,

Plaintiff,

vs.

GERLING AMERICA INSURANCE  
COMPANY, a foreign corporation,

Defendant.

CASE NO. C 07 06302 CRB

**PLAINTIFF'S MOTION TO COMPEL  
[F.R.C.P. 37]**

**Hearing Date: July 18, 2008**

**Time: 10:00 a.m.**

**Courtroom: 8**

**TO: THE HONORABLE COURT AND TO DEFENDANT AND COUNSEL OF RECORD:**

**PREFACE**

**COMES NOW** the Plaintiffs, FIREMAN'S FUND INSURANCE COMPANY a/s/o  
BASIC RESOURCES, INC. and GEORGE REED, INC. ("FFIC"), by and through undersigned  
counsel and pursuant to Federal Rule of Civil Procedure 37, Civil L.R. 7-1 through 7-5, inclusive,  
as well as the legal authorities cited herein, hereby respectfully moves this Court to Compel

1 Defendant, GERLING AMERICA INSURANCE COMPANY ("GERLING") to fully and properly  
2 respond to Plaintiff's Request For Production numbered 4, 9, and 10, and as grounds therefore, would  
3 show unto the Court as follows:

4 **CERTIFICATION**

5 Counsel certifies, pursuant to FED. R. CIV. P. 37(a)(2) and Civil L.R. 37-1 that it has  
6 conferred in good faith with counsel for GERLING, and was unable to resolve the disputes as to  
7 these requests.  
8

9 **BACKGROUND**

10 This is a coverage dispute where FFIC seeks to compel discovery from GERLING,  
11 requesting this Court to compel GERLING to produce documents relating to claims paid by  
12 GERLING, other claims made against Gencor during the same policy period, and the underwriting  
13 files relating to Gencor during the same policy period.  
14

15 **STANDARD**

16 A party is entitled to obtain discovery regarding any matter, not privileged, that is relevant to  
17 the claim or defense of any party. FED. R. CIV. P. 26(b)(1). Parties may obtain discovery which  
18 encompasses any matter that bears on, or that reasonably could lead to other matters that could bear  
19 on, any issue that is or may be in case; question of relevancy is to be more loosely constructed at  
20 discovery stage than at trial. FED. R. CIV. P. 26(b)(1). The party resisting discovery has the burden  
21 of clarifying, explaining, and supporting its objections. FED. R. CIV. P. 26(b)(1). If an entity fails to  
22 make a designation, or fails to permit inspection of documents as requested, the discovering party  
23 may move for an Order compelling an answer and/or inspection. FED. R. CIV. P. 37(a)(2). Federal  
24 law applies to all procedural issues. *Esfeld v. Costa Crociere S.P.A.*, 289 F.3d 1300 (11th Cir.  
25 2002).  
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**DISPUTED DISCOVERY REQUESTS****Request for Production No. 4:**

Any and all documents related to an accounting or other evidence of any and all claims paid by Defendant on behalf of Gencor Industries, Inc. under the "Insurance Policy" at issue in the above-styled case.

**Response to Request for Production No. 4:**

Gerling objects to the request to the extent it seeks documents that are protected by the attorney-client privilege or attorney work product doctrine. Gerling further objects to the request to the extent it seeks confidential and/or proprietary information unrelated to issue of whether the Gerling policy provides coverage for FFIC's claims. Gerling further objects to the request to the extent that it calls for the production and disclosure of information that would violate the privacy rights of third parties not involved in this action. Gerling further objects to the request as not relevant or likely to lead to the discovery of admissible evidence.

Subject and without waiving these objections, Gerling responds as follows: Gerling will not produce documents responsive to this request as they do not relate to the issue of whether the Gerling policy at issue provides coverage for FFIC's claims.

**Argument to Compel:**

FFIC moves to compel GERLING to fully comply with above request because failure to do so will prejudice Plaintiff's ability to efficiently move forward in this matter. Pursuant to Florida Statute §627.4037(c), FFIC has previously requested information relating to the available policy limits from GERLING.

In response to the complaint filed by FFIC, GERLING raised Affirmative Defense No. 13 alleging: "FFIC's claims are barred because the aggregate limits provided by the Gerling Policy have been *exhausted* and therefore no coverage is available for the damages claimed."

1 Notwithstanding the fact that no factual basis for this assertion was provided, on May 27, 2008,  
2 FFIC received GERLINGS Reservation of Rights letter dated May 14, 2007, providing in relevant  
3 part on page 7, "Gerling has already made payments of \$750,000 on products-completed operations  
4 cases relating to damages incurred during the applicable policy period." This letter directly  
5 contradicts GERLING's thirteenth Affirmative Defense and indicates that there is in fact coverage  
6 that currently exists under this policy. Therefore, this information is of the utmost materiality to  
7 FFIC's decision regarding how to further proceed in this matter.  
8

9 Further bolstering FFIC's confusion, as a result of GERLING's failure to provide an  
10 adequate response to the above request, counsel for GERLING has informally indicated that the  
11 policy limits have been reduced by only \$15,000 to date.  
12

13 Inherent to GERLING's thirteenth Affirmative Defense is the prospect that GERLING  
14 intends to escape responsibility due to exhaustion of the policy limits. Accordingly, FFIC has an  
15 obligation to inquire further and is certainly entitled to discovery of such evidence, or absence  
16 thereof, in order to clarify this discrepancy.

17 The goal of discovery is to facilitate the ascertainment of the truth; because GERLING has  
18 asserted that coverage for this claim has been "exhausted," and without providing any evidence to  
19 support this assertion, GERLING has effectively opened the door for FFIC to explore the basis of  
20 this claim.  
21

22 As to GERLING's objection to attorney-client privilege or attorney work product doctrine,  
23 FFIC is not requesting the production of any documents protected by this privilege; this request for  
24 accounting and policy payments may properly exclude any such documents protected under this  
25 principle, so long as properly adhering to the axiom that the attorney-client privilege must be  
26 'strictly confined within the narrowest possible limits consistent with the logic of its principle.' *In a*  
27  
28

1 *re Sealed Case*, 676 F.2d 793, 807 N. 44 (D.C. Cir. 1982) (citing *In re Grand Jury Investigation*,  
2 599 F.2d 1224, 1235 (3d Cir.1979)).

3 **Request for Production No. 9:**

4 Any and all documents relating to claims made against Gencor between 1999 and 2005.

5 **Response to Request for Production No. 9:**

6  
7 Gerling objects to the request to the extent it seeks documents that are protected by the  
8 attorney-client privilege or attorney work product doctrine. Gerling further objects to the request to  
9 the extent it is overbroad as to time and therefore unduly burdensome and/or oppressive. Gerling  
10 further objects to the request to the extent it seeks confidential and/or proprietary information  
11 unrelated to the issue of whether the Gerling policy provides coverage for FFIC's claims. Gerling  
12 further objects to the request to the extent that it calls for the production and disclosure of  
13 information that would violate the privacy rights of parties not involved in this action. Gerling  
14 further objects to the request as not relevant or likely to lead to the discovery of admissible  
15 evidence.  
16

17 Subject to and without waiving these objections, Gerling responds as follows: Gerling will  
18 not produce these requested documents as they do not relate to the issue of whether the Gerling  
19 policy at issue provides coverage for FFIC's claims.  
20

21 **Argument to Compel:**

22 FFIC moves to compel GERLING to comply with the above request and to provide all  
23 documents relating to claims made against Gencor between 1999 and 2005. This request does not  
24 exceed the extent of discovery under FED. R. CIV. P. 26(b)(2) because it is reasonably limited to the  
25 respective period of the policy at issue in this matter.

26 On May 27, 2008, FFIC was provided with Mr. Spector's May 14, 2007 Reservation of  
27 Rights letter. This letter specifically indicates on page 7, "due to the payments already made for  
28

1 products-completed operations cases for damages incurred during the policy period, and the  
2 possible exposures that the Dannolfo matter presents, the available funds of the Products-Completed  
3 Operations Aggregate Limit may be limited and/or possibly exhausted.”

4         Given the information obtained from the Reservation of Rights letter, it appears GERLING  
5 may have been presented with similar occurrences under said policy. Accordingly, FFIC is entitled  
6 to discover (a) whether GERLING was in fact presented with a similar occurrence, and if so (b)  
7 whether coverage was denied, or more important, whether coverage was provided. Since  
8 GERLING is claiming that no coverage exists as to this claim, under this policy, certainly discovery  
9 of evidence relating to other claims may have direct bearing on whether or not coverage exists  
10 herein.  
11

12         Requests pertaining to previous lawsuits are “reasonably calculated to lead to the discovery  
13 of admissible evidence.” *Librado v. M.S. Carriers, Inc.*, No. Civ.A-3:02-CV-2095-D, 2003 WL  
14 22768675, at \*1 (N.D. Tex. March 10, 2003). “It is well settled that for ‘discovery purposes, the  
15 court need only find that the circumstances surrounding the other [lawsuits] are similar enough that  
16 discovery concerning those incidents is reasonably calculated to lead to the uncovering of  
17 substantially similar occurrence.” *Id.* (quoting *Lohr v. Stanley-Bostitch, Inc.*, 135 F.R.D. 162, 164  
18 (W.D. Mich. 1991)); *Briney v. Deere*, 150 F.R.D. 159 (D. Iowa, 1993). In *Librado*, the court held  
19 that an interrogatory seeking information on previous lawsuits filed against the defendant in the  
20 preceding five years involving claims similar to the ones at issue in the lawsuit-personal injury  
21 resulting from a car accident-was appropriate. “The presence of these circumstances in another  
22 lawsuit makes that lawsuit similar enough that its discovery is reasonably calculated to lead to the  
23 uncovering of a substantially similar [incident].” *Librado*, 2003 WL 22768675, at \*4.  
24 Additionally, the *Librado* court held that an interrogatory seeking information on lawsuits within  
25 the past five years, “is a reasonable time period for discovering information.” *Id.* at \*1.  
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1 As to GERLING's objection to attorney-client privilege or attorney work product doctrine,  
2 FFIC is not requesting the production of any documents protected by this privilege; this request for  
3 documents relating to claims made against Gencor may properly exclude any such documents  
4 protected under this principle, so long as properly adhering to the axiom that the attorney-client  
5 privilege must be 'strictly confined within the narrowest possible limits consistent with the logic of  
6 its principle.' *In a re Sealed Case*, 676 F.2d 793, 807 N. 44 (D.C.Cir. 1982) (citing *In re Grand*  
7 *Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir.1979)).

9 **Request for Production No. 10:**

10 The underwriting files relating to Gencor from 1999 to 2005.

11 **Response to Request for Production No. 10:**

12 Gerling objects to the request to the extent it seeks documents that are protected by the  
13 attorney-client privilege or attorney work product doctrine. Gerling further objects to the request to  
14 the extent it is overbroad as to time and therefore unduly burdensome and/or oppressive. Gerling  
15 further objects to the request to the extent it seeks confidential and/or proprietary information  
16 unrelated to issue of whether the Gerling policy provides coverage for FFIC's claims. Gerling  
17 further objects to the request to the extent that it calls for the production and disclosure of  
18 information that would violate the privacy rights of parties not involved in this action. Gerling  
19 further objects to the request as not relevant or likely to lead to the discovery of admissible  
20 evidence.  
21

22  
23 Subject to and without waiving these objections, Gerling responds as follows: Gerling will  
24 not produce these requested documents as they do not relate to the issue of whether the Gerling  
25 policy at issue provides coverage for FFIC's claims.  
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1 **Argument to Compel:**

2 FFIC moves to compel compliance with discovery requesting GERLING to produce the  
3 underwriting files relating to Gencor from 1999 to 2005. This request does not exceed the extent of  
4 discovery under FED. R. CIV. P. 26(b)(2) because it is reasonably limited to the respective period of  
5 the policy at issue in this matter.  
6

7 In response to the complaint filed by FFIC, GERLING raised Affirmative Defense No. 10  
8 asserting: "FFIC's claims are barred, in whole or in part, pursuant to the 'Engineers, Architects or  
9 Surveyors Professional Liability' exclusion of the Gerling Policy as Gencor was allegedly obligated  
10 under the written contract with Basic Resources and George Reed to provide adequate field  
11 engineering service and the damages claimed allegedly arose out of those services rendered by  
12 Gencor employees, thereby excluding coverage."  
13

14 Accordingly, the issue of whether GERLING extended or contracted the available coverage  
15 and what information Gencor provided regarding its "professional services" is highly relevant to the  
16 tenth Affirmative Defense raised by GERLING. This Affirmative Defense invites, if not requires,  
17 discovery as to (a) whether and (b) to what extent Gerling had knowledge of the professional  
18 qualifications, if any, that employees of Gencor held. Common sense tells us that the underwriting  
19 analysis performed by GERLING in their initial evaluation regarding whether or not to provide  
20 coverage is certainly related to whether GERLING had knowledge, lacked knowledge, or had the  
21 opportunity to learn whether Gencor employees (especially Calvin Dixon, the technician involved  
22 herein) held any professional qualifications.  
23

24 Further, because the presumption is that this information is discoverable, the burden is on  
25 GERLING to justify its failure to comply. See FED. R. CIV. P. 26. Discovery of such documents,  
26 where relevant to an initial evaluation by the insurer does not exceed the accepted scope permitted  
27 under the Federal Rules. See Old Second Nat. Bank of Aurora v. Commercial Union, No. 99 C  
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3941, 1999 WL 1068635, at \*5 (N.D.Ill. 1999) (granting motion to compel compliance with discovery request to produce underwriting file); see also Nestle Foods Corp. v. Aetna Cas. and Sur. Co., 135 F.R.D. 101(D.N.J. 1990) (general liability insurers were required to produce their ten earliest and ten most recent underwriting files concerning other insureds since information may show that identical policy language has been afforded various interpretations by insurers); Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 20 Fed. R. Serv. 3d 1479 (E.D. Pa. 1991) (insurers were required to produce claim and underwriting files pertaining to coverage to determine scope of liability policies).

**WHEREFORE**, on the basis of the above and foregoing grounds, Plaintiff respectfully requests that this Court enter an Order compelling Defendant, GERLING AMERICA INSURANCE COMPANY, to fully respond to the above referenced Requests for Production.

DATED: 12th DAY OF June 2008.

By: /s/ Jon D. Derrevere  
 JON D. DERREVERE  
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Co-counsel for Plaintiff

**PROOF OF SERVICE**

*Fireman's Fund Ins. Co. v. Gerling American Ins.*

United States District Court, Northern District of California

Case No.: C 07 06302 CRB

I am employed in the City and County of West Palm Beach, State of Florida. I am over the age of 18 and not a party to the within action; my business address is: Derrevere, Hawkes & Black, 470 Columbia Drive, Building "B", West Palm Beach, Florida 33409.

On this 12<sup>th</sup> day of June, 2008, I served the foregoing document(s) described as:

**PLAINTIFF'S MOTION TO COMPEL**

On the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed enveloped addressed as stated below:

**[ ] BY REGULAR MAIL:**

I caused such envelopes to be deposited in the United States Mail at West Palm Beach, Florida with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with United States postal service each day and that practice was followed in the ordinary course of business for the service herein attested to.

**[X] BY ECF:**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of June, 2008, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on: TINO X. DO, Barger & Wolen, LLP, 650 California Street, 9<sup>th</sup> Floor, San Francisco, CA 94108, [tdo@barwol.com](mailto:tdo@barwol.com) and CHARLES K. BRUNN, Brunn & Flynn, 928 12<sup>th</sup> Street, Suite 200, P.O. Box 3366, Modesto, CA 95354, [CBrunn@Brunn-Flynn.com](mailto:CBrunn@Brunn-Flynn.com) via transmission of Notices of Electronic Filing generated by CM/ECF.

**[X] FEDERAL** - I declare that I am employed in the office of a member of the Florida Bar, admitted to practice in all Florida Courts and who makes this Pro Hac Vice Application, that our co-counsel and sponsor is a member of the bar of this California Court, and at their direction this service was made. Executed at West Palm Beach, Florida on this 12<sup>th</sup> day of June, 2008.

NAME: **Deanna N. Menendez**

Signature: Deanna N. Menendez